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No. 07-1122

IN THE
Supreme Court of the United States

STATE OF ARIZONA,
Petitioner,

v.

LEMON MONTREA JOHNSON,
Respondent.

On Writ Of Certiorari to the Court Of Appeals of Arizona

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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STATEMENT OF INTEREST[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; to promote the proper and fair administration of criminal justice; and to emphasize the continued recognition and adherence to the Bill of Rights that is necessary to sustain the quality of the American system of justice. As such, the NACDL has a strong interest in the preservation of the Fourth Amendment rights that are at issue in this case.

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus or its counsel made a monetary contribution to its preparation or submission. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

ARGUMENT

Both petitioner and *amicus* United States, going beyond the narrow facts of this case, articulate an unprecedented, and dangerously open-ended, view of law enforcement officers' authority to perform so-called *Terry* searches. In particular, they contend that officers may lawfully "frisk" a person they reasonably believe to be armed and dangerous, even when there is no suspicion of wrongdoing and no need for the officer to interact with the person at all — *i.e.*, "whenever the officer encounters that person in a place where the officer has a lawful right to be." Br. of United States at 9; *see also* Pet. Br. at 23.

This sweeping rule goes far beyond the narrow Fourth Amendment exception created by *Terry v. Ohio* and its progeny, which have required specific reason for an officer to interact with a citizen before a subsequent search for officer safety purposes may be constitutional. *E.g., Adams v. Williams*, 407 U.S. 147 (1972) (citing and applying *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). And it threatens to create precisely the sort of unbounded officer discretion that the Framers of the Fourth Amendment were most concerned with eliminating.

POINT I

TERRY REQUIRES OFFICERS TO HAVE A NEED TO CONFRONT A PARTICULAR CITIZEN BEFORE A FRISK CAN BE JUSTIFIED

Terry v. Ohio addressed "the quite narrow question" of "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest." 392 U.S. 1, 17 (1968). *Terry*'s

holding, like its framing of the question, was narrow: that a frisk is justified when officers can reasonably conclude both that "criminal activity may be afoot *and* that the persons . . . may be armed and presently dangerous." *Id.* at 30 (emphasis added). *See also Adams*, 407 U.S. at 146 (limited search for weapons may be conducted *"[s]o long as the officer is entitled to make a forcible stop*, *and* has reason to believe that the suspect is armed and dangerous") (emphasis added).

Petitioner and the United States now seek to omit the first requirement for a *Terry* search, and to replace it with the essentially meaningless limitation that the officer have a "lawful right" to be present. Br. for U.S. at 9. This rule simply cannot be squared with *Terry.* As Justice Harlan observed in his *Terry* concurrence, it is implicit in the Court's holding that the mere permissibility of the officer's presence is not enough: the frisk in *Terry* was permissible "only because circumstances warranted forcing an encounter with Terry in an effort to prevent or investigate a crime." 392 U.S. at 34 (Harlan, J., concurring). Absent the justification created by the need to investigate reasonably suspected criminal activity, the officer is "at liberty to avoid a person he considers dangerous," and accordingly officer safety cannot justify an invasion of the person's privacy. *Id.* at 32.

Justice Harlan's interpretation of the majority opinion is clearly correct. The holding in *Terry* is expressly premised on a balancing of the substantial individual interest in avoiding "a severe, though brief, intrusion upon cherished personal security," 392 U.S. at 24-25, against "the governmental

interest which allegedly justifies [the] official intrusion." *Id.* at 21 (internal quotation marks omitted). Under the circumstances of *Terry*, the governmental interest in the officer engaging in an encounter with the defendant was substantial — the officer had a need to investigate suspicious activity, in a situation in which simply avoiding the defendant was not an appropriate option: given that a crime appeared to be afoot, "it would have been poor police work indeed" to fail to actively investigate further. *Id.* at 22-23. In weighing these interests, this Court held that legal authority should be "narrowly drawn" to allow a limited search to serve the governmental interests of both criminal investigation and officer safety "in the investigative circumstance." *Id.* at 26, 27.

This reasoning cannot support the "lawfully present" rule proposed in support of petitioner here. In consensual police encounters, involving no reasonable suspicion of criminal activity, there is no pressing governmental need for an officer to confront an individual who he suspects may be dangerous, and, therefore, no basis for invading Fourth Amendment rights. Accordingly, as Justice Harlan recognized, under *Terry*, "the right to frisk . . . depends upon the reasonableness of a forcible stop to investigate a suspected crime." *Id.* at 33 (Harlan, J., concurring). Although this Court has extended this reasoning to other circumstances in which an officer has a need to interact with an individual he believes to be dangerous, *see, e.g., Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977), it has never applied it to circumstances in which the officer has no such need — *i.e.*, where the officer is merely lawfully present.

As a practical matter, moreover, the additional searches that would be justified by the proposed blanket rule are exclusively those where the officer does *not* have a legal basis to detain the suspect and where being armed would *not* by itself constitute criminal conduct.[2] Such a rule would therefore apply principally where the person searched is acting in a lawful manner and the officer is acting on a "hunch" or some other grounds that is inadequate to justify a privacy intrusion in the first instance.

Indeed, under the proposed rule — with the limitation of reasonable suspicion of criminal activity eliminated — the "serious intrusion" and "great indignity" of a police pat-down, *Terry*, 392 U.S. at 17, 29, will be available at the essentially untrammeled discretion of law enforcement officers. This conflicts with one of the central purposes of Fourth Amendment requirements, which is the restriction of such discretion. "[S]tandardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (holding that a vehicle stop for the purpose of

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[2] It is worth noting that the factual basis for suspecting that an individual is "armed and dangerous" will frequently also provide a reasonable suspicion of a criminal violation. Carrying a concealed weapon is itself a crime in many jurisdictions. Petitioner and the United States, however, seek authorization for officers to search even when, as here, there is no crime suspected.

checking the driver's license and registration where no individualized suspicion exists violates the 4th amendment); *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, dissenting) ("[U]nbounded discretion carries with it grave potential for abuse.").

Finally, it is worth noting that, as the *Terry* Court observed, countenancing aggressive and discretionary police use of pat-down searches "cannot help but be a severely exacerbating factor in police-community tensions." 392 U.S. at 14 n.11. The proposed rule would also create a disincentive for voluntary cooperation with police, where such consensual contact will justify an invasive personal search upon any suspicion that an individual is armed.

POINT II

CONCERN ABOUT EXCESSIVE DISCRETION TO SEARCH WAS AT THE CORE OF THE FRAMING OF THE FOURTH AMENDMENT

At the core of the Fourth Amendment's history is a strong concern about officers having excessively broad discretion to intrude upon citizens' privacy. The broad officer discretion that petitioners and the United States seek to enable is directly contrary to these fundamental concerns of the Framers.

One of the core concerns of the Framers was to prohibit searches conducted in the absence of reasonable suspicion of illegal activity. Before 1760, the New England and mid-Atlantic colonies permitted general and warrantless searches as a "standard method of law enforcement." Tracey Maclin, *The Complexity of the Fourth Amendment:*

A Historical Review, 77 B. U. L. REV. 925, 939 (1997). Colonial attitudes toward these sweeping intrusions into citizens' privacy grew increasingly hostile in the mid-1700s, and public opposition towards customs officers' arbitrary searches was particularly sharp. *See* Maclin at 945 (quoting M. H. Smith, *The Writs of Assistance Case* 114-15 (1978)) (describing how "more impressive authority than mere customs officer's commission" was needed to enforce searches).

In addition, general warrants, also known as "writs of assistance," were "an anathema in the colonies," and are considered to be a major cause of the Revolution. *See generally* O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in THE ERA OF THE AMERICAN REVOLUTION 54 (1937). They permitted officers to search, with broad discretion, "wherever they suspected uncustomed goods to be, and to break open any receptacle or package falling under their eye." Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 54 (1937). Customs officers could obtain writs of assistance "without alleging illegal activity as a precondition for them, without judicial superintendence, and without the possibility of refusal." Maclin, 77 B.U. L. Rev. at 946. After the Revolution, states widely eliminated the offensive general warrant, and replaced it with specific warrants, thereby sharply curbing an officer's discretion in conducting searches. *Id.* at 949.

Notably, distrust of common officers and opposition to delegating authority to them were consistent themes in complaints against the writs of assistance. During the 1761 *Writs of Assistance*

Case, James Otis decried the delegation of authority to "petty" officers. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 548, 578 (1999-2000). In the seventeenth century, Sir Matthew Hale criticized general warrants in his criminal law treatise because they allowed officers to act as their "own judge," a principle Sir Edward Coke had also invoked in *Dr. Bonham's Case*. *See* 2 Sir Matthew Hale, *History of the Pleas of the Crown* 150 (Solemn Emlyn ed., 1736); Davies at 692. Furthermore, a leading eighteenth-century authority on criminal procedure, Serjeant William Hawkins, opposed general warrants because they inappropriately gave discretion to common officers to decide who to arrest and where to search. *Id.* at 579. In the 1765 proceedings in *Leach v. Money*, Lord Mansfield stated that general warrants were illegal under common law because an officer should not have the discretion to make arrest and search judgments. *Leach v. Money,* 3 Burr. 1742, 1766, 19 Howell St. Tr. 1001, 1027, 97 Eng. Rep. 1075, 1088 (K.B. 1765). Blackstone later wrote that "it is the duty of the magistrate, and ought not be left to the officer, to judge of the grounds of suspicion." 4 William Blackstone, *Commentaries on the Laws of England* 288 (1769, reprinted facsimile The University of Chicago Press, 1979). In yet another case, *Wilkes v. Wood,* Judge Pratt also decried the discretionary nature of the general warrants, noting that "a discretionary power given to [officers] to search wherever their suspicions may change to fall. . . is totally subversive to the liberty of the subject." *Wilkes v. Wood,* Lofft 18, 18, 19 Howell St. Tr. 1153, 1167, 98 Eng. Rep. 489, 498 (C.P. 1763). These accounts clearly demonstrate that framing-era

authorities opposed placing broad discretion in the hands of common officers.

Moreover, Pennsylvania, Virginia, and Florida judges used similar reasoning against the writs authorized by the Townshend Act of 1767, arguing that officers should not be given such extensive power to exercise at their own discretion. Dickerson, *Writs of Assistance*, at 60-61, 64, 69. For example, William Henry Drayton, a Charleston judge, and Patrick Henry both repeatedly opposed allowing officers to exercise discretion in search and arrest decisions. William Henry Drayton, *A Letter from Freeman*, Aug. 10, 1774, *reprinted in* I DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION 11, 15 (R.W. Gibbes ed., 1855, reprinted 1972); 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 587-88 (Jonathan Elliot ed., 2d ed. 1838, reprinted in facsimile 1937); *see* Davies, *Recovering the Original Fourth Amendment*, at 581-82. Patrick Henry likewise objected to searches lacking an initial basis, stating:

> [G]eneral warrants, by which an officer may search suspected places, *without evidence of the commission of fact*, or seize any person, *without evidence of his crime*, ought to be prohibited. As these are admitted, any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power.

3 DEBATES at 588 (emphasis added).

Thus, allowing any lawfully present officer to search any person based solely on a belief he or she is armed and dangerous stands in direct opposition to framing-era principles. To be sure, exigent circumstances may require departure from bright-line Fourth Amendment requirements and acceptance of searches that are necessitated by the exigency. But that is no justification for the rule proposed here, under which serious invasions of personal privacy would be permitted in the absence of any need to depart from Fourth Amendment protections.

In short, given the historical distrust of common officer discretion, the Framers would not have sanctioned the broad use of warrantless frisks without a demonstrable need for an encounter. *See* Davies, 98 MICH. L. REV. at 582. The sweeping rule proposed by petitioner and the United States cannot be squared with the core concerns embodied in the Fourth Amendment.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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